900 17th Street, NW, Suite 400, Washington, DC 20006
202-296-6650 (tel) 202-296-7585 (fax)
www.comptel.org

October 23, 2007

<u>By Electronic Filing</u>

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: <u>*Ex Parte Notice;* WC Docket No. 06-147</u>

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, COMPTEL hereby gives notice that, on October 22, 2007, its representative had a meeting, via teleconference, with John Hunter, Chief of Staff and Senior Legal Advisor, Wireline Issues, for Commissioner Robert McDowell. In this meeting COMPTEL asked the FCC to give special attention in its pending decision on the forbearance petitions of Embarq and Citizens in the above-referenced dockets to how any obligation to de-tariff all non-DS0-based special access services could be practicably reconciled with any ongoing obligations requiring the carriers to comply with Sections 201 and 202 of the Communications Act of 1934 ("the Act").

Specifically, COMPTEL drew attention to the concern that it has raised in the Special Access Rulemaking docket (WC 05-25) that incumbents with market power for certain services have the ability, through exclusionary discounting practices, to subject potential competitors (for certain of the special access services for which forbearance has been requested) to "undue or unreasonable prejudice or disadvantage" prohibited by Section 202(a) of the Act.[1] Given that carriers like Embarq and Citizens are likely to have far fewer contract tariffs than the Bell Operating Companies ("BOCs"), it seems probable that the services for which Embarq and Citizens seek forbearance will be able to be "detariffed" much sooner than the same services for which AT&T received forbearance earlier this month. In light of this consequence, assuming a similar grant of forbearance for Embarq (which is not similarly situated to AT&T with respect to ongoing merger commitment obligations), COMPTEL urged the Commission to provide some specific guidance with respect to certain practices which could be deemed—in certain circumstances—to unreasonably discriminate against third parties. COMPTEL explained that such guidance was necessary to protect third-party competitors, who would now be "blind" to instances where they were targets of anticompetitive discrimination by incumbents.

While the clarification COMPTEL requested regarding these specific unreasonable practices would be by no means exhaustive of all possible practices that could be held to violate Sections 201 or 202, it would be appropriate—and consistent with deregulation—for the Commission to bring its analysis of one type of exclusionary conduct in line with the rules that apply to other "free market" products and services that are not regulated, but otherwise subject to the antitrust laws. To this end, COMPTEL suggested that the Commission adopt the "discount attribution" test the 9th Circuit used recently in *Cascade Health Solutions v. PeaceHealth*, 2007-2 Trade Cas. (CCH) ¶75,846, which has also been advocated by the leading antitrust treatise, which explains,

> [t]o see whether a package price is "exclusionary" . . . one simply attributes the entire discount on all products in the package to the product for which exclusion is claimed. If the resulting price is less than the defendant's cost, then the package discount is exclusionary as against a rival who makes only one of the two goods in the package.[2]

Thus, to apply this example to the services for which forbearance is sought in the above-captioned docket, the Commission could easily determine practices which unreasonably prejudiced competitors by offering discounts off still-regulated services (DS1s and DS3s) in exchange for commitments to purchase non-tariffed services (like optical networking services). This test would be relatively easy for the Commission to implement. In doing so, the Commission would multiply the dollar

---

[1] See, *e.g.*, Comments of COMPTEL, WC Docket No. 05-25, filed August 8, 2007, at pp. 9-15.
[2] 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 749b2 at 335-36 (Supp. 2006) (footnotes omitted).

value of the combined discounts on DS1 or DS3 services (vs. the month to month tariff rate) and then apply this number to the non-tariffed, contract price of the optical transmission services. If the application of the regulated-service discounts causes the price of the non-regulated service to go below a measure of efficient cost (such as that provided under the TELRIC methodology), then the practice should be held to violate Sections 201 and 202 of the Act, as the practice would violate the antitrust laws as well.

COMPTEL argued that, by providing some elucidation on at least one practice that would violate the remaining portions of the Act that were still in full force (assuming the FCC elects to provide Embarq the same relief given to AT&T on October 11^{th}), all parties (the incumbent LECs, purchasers of multiple products, and competitors of the incumbents for the soon-to-be-non-dominant services) would benefit from the clarification. Incumbent LECs would be able to fashion more flexible offerings with a very clear understanding of how to avoid violating the relatively broad prohibitions of Sections 201 and 202. Similarly, purchasers would be able to benefit from discounted offerings, but would still be able to take advantage of offers by more efficient providers of the deregulated services. Additionally, competition would be protected, because efficient competitors would not be foreclosed from providing any of the services for which partial forbearance may be granted. Finally, the FCC will benefit from a clearly articulated standard that can be efficiently applied without elaborate, expensive, and resource-intensive open-ended investigations.

Representing COMPTEL was the undersigned attorney.

Sincerely,

/s/ Jonathan Lee